

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

13
95
77-2075

United States Court of Appeals

For the Second Circuit

ALBERT VICTORY,

Petitioner-Appellee,

against

ROY BOMBARD, as Superintendent of
Greenhaven Correctional Facility,

Respondent-Appellant.

**On Appeal from the United States District Court
for the Southern District of New York**

JOINT APPENDIX

ROBERT M. MORGENTHAU

District Attorney

New York County

Attorney for Respondent-Appellant

155 Leonard Street

New York, New York 10013

(212) 732-7300

WILLIAM E. HELLERSTEIN

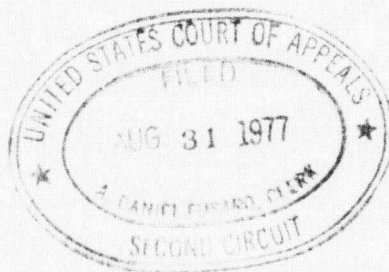
The Legal Aid Society

Attorney for Petitioner-Appellee

15 Park Row—18th Floor

New York, New York 10038

(212) 577-3420



PAGINATION AS IN ORIGINAL COPY

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[DOCKET ENTRIES]

1 a

ST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
208-1	76 3493	8 5 76	3	H.C.	1				0839 0845		76 3493

PLAINTIFFS

DEFENDANTS

ALBERT VICTORY

ROY BOMBARD, Warden of Green-
haven Correctional Facility

FW

Related to 75 Civ 6000 & 76 Cr. 195

CAUSE

28 U.S.C. 2254 - Habeas Corpus

ATTORNEYS

Henry Winestein
Legal Aid Society
15 Park Row, NYC 10036
577-3420

Robert M. Morgenthau, D.A.
N.Y. County - 155 Leonard St.
NYC 10013 732-7300
Henry J. Steinglass, Ass't D.A.

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE AUG 5 1976		C.D. NUMBER	STATISTICAL CARDS	
	RECEIPT NUMBER 11-7			CARD X	DATE MAILED 5-31-77

UNITED STATES DISTRICT COURT DOCKET

DC 111 (Rev. 1/75)

8-5-76	Filed Petition for a Writ of Habeas Corpus. 28 USC 2254
8-5-76	Filed Order granting permission to proceed in forma pauperis...GOETTE
8-6-76	Filed Petitioner's memo of law in support of petition for habeas corp
8-9-76	Filed petitioner's notice of motion for an order granting a writ of habeas corpus.
8-6-76	Filed Petitioner's petition for a writ of habeas corpus.
9-27-76	Filed Stip & Order adj. to 10-3-76 respondent's time to answer..... WARD, J.
10-7-76	Filed Respondent's affdvt & notice of motion ext. to 10-19-76 to file its response.
10-8-76	Filed Petitioner's affdvt in opposition to Respondent's motion for extension of time to answer.
10-27-76	Filed Respondents affdvt & notice of motion ext. to 10-22-76 for Respondent to file response.
10-27-76	Filed Respondents affdvt re petition for habeas corpus seeking to vacate judgment of the Supreme Court, State & County of N.Y.
10-27-76	Filed Respondent's memo of law in opposition to petition for habeas corpus.
11-12-76	Filed Petitioners affdvt in reply to respondents opposition to petitio
11-12-76	Filed Petitioners reply memo in support of petition for habeas corpus.
11-30-76	Filed Respondent's supplemental affdvt re petition for habeas corpus.
11-30-76	Filed Respondent's supplemental memo of law in opposition to petition for habeas corpus.
12-10-76	FILED - COURT OF APPEALS - Judge Hand.
5-31-77	Filed Memo-End on Respondents motion filed on 10-7-76....Motion Granted So Ordered.....WARD, J. m/n
5-31-77	Filed Memo-End On Respondents motion filed on 10-27-76....Motion Granted So Ordered.....WARD, J. m/n
5-31-77	Filed Opinion #45970...Accordingly, the writ is granted on this claim. Etc....The people are directed to re-try petitioner within ninety days of the final determination of this matter, or at the end of that period unconditionally release petitioner from custody. This petition poses significant questions of law upon which the court of appeals should rule. Accordingly, this court will issue a Certificate of Probable Cause.....So Ordered.....WARD, J. m/n
5-31-77	Filed Certificate of probable cause...Ward, J.
5-31-77	Filed Memo-End on Notice of Motion 8-5-76. Petition granted in accordance with opinion filed herewith. M/N ...Ward, J.
5-31-77	Filed Memo-end on N.O.F.M. 8-9-76. Motion granted in accordance with opinion filed herewith. M/N ...Ward, J.

iv 3493

JUDGE MACMURDO

76 civ 3493

CIVIL DOCKET CONTINUATION SHEET

page #3.

PLAINTIFF		DEFENDANT	DOCKET NO. _____
			PAGE ____ OF ____ PAGES
DATE	NR.	PROCEEDINGS	
6-28-77		Filed Respondent's Notice of appeal from the final order dtd 5-31-77. Mailed Copies.	
6-30-77		Filed Order to Show Cause why an order should not be made releasing Petitioner from confinement by respondent etc...Ret: 7-5-77 at 11:30 AM 506.	
6-30-77		Filed Petitioners Memorandum in support of application for release pending appeal and pending retrial in the Supreme Court of N.Y.S.	
7-5-77		Filed Stip that the return date of Petitioner's motion for bail and appeal be adj. to 7-22-77 at 11:30 am...Ward, J.	
7-6-77		Filed Petitioners supplemental affdvt. to supplement the facts set forth in my affdvt. of 6-28-77 in support of petitioner's application for enlargement.	
7-20-77		Filed defts. affdvt. in opposition to petitioner's pending bail application.	
7-20-77		Filed affdvt. of Rhea Kemble Neugarten, in opposition to Albert Victory's petition for bail pending appeal in this proceeding.	
7-20-77		Filed Respondent's memorandum of law in opposition to petitioner's application for bail.	
7-25-77		Filed transcript of proceedings dated 7-20-77.	
7-25-77		Filed memorandum endorsed on order to show cause filed 6-30-77 releasing petitioner from confinement. Motion granted with oral decision rendered on July 20, 1977 and memorandum decision filed herewith. Ward, J. m/n	
7-25-77		Filed Memorandum Decision: Petitioner's application for enlargement pending respondent's appeal granting writ of habeas corpus is granted on bail which is fixed at \$10,000.00 cash or surety and conditions indicated. The petitioner's release on bail is stayed until 7-28-77 at 10 am to enable respondent to apply to USCA for any relief deemed appropriate. Ward, J. m/n	

A TRUE COPY

RAYMOND P. BUECHTER, CLERK

By
Deputy Clerk

[PETITION FOR A WRIT OF HABEAS CORPUS]

4 a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ALBERT VICTORY,

Petitioner, : 76 Civ.

-against- : PETITION FOR A WRIT
OF HABEAS CORPUS

ROY BOMBARD, as Warden of Greenhaven
Correctional Facility, :

Respondent. :

-----X

TO THE JUDGES OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Albert Victory respectfully shows:

1. I am currently confined pursuant to a judgment of the Supreme Court of the State of New York, New York County, dated May 26, 1970, under indictment numbers 4894/68 and 4896/68, and am in the legal custody of respondent Roy Bombard as Warden of Greenhaven Correctional Facility.

2. I was convicted of felony murder, New York Penal Law §125.25 subd. 3, after a jury trial before Hon. Irwin D. Davidson, and was sentenced to a term of 25 years to life imprisonment. A co-defendant at the trial, Robert Bornholdt, was convicted of both felony murder and intentional murder and received concurrent sentences of 25 years to life.

3. The conviction was affirmed without opinion by the Appellate Division of the Supreme Court, First Department, on December 7, 1971, 38 A.D.2d 689. The New York Court of

Appeals affirmed with an opinion reported sub nom.

People v. Bornholdt, 33 N.Y.2d 75 (1973), and a petition for certiorari was denied, Victory v. New York, 416 U.S. 905 (1974).

4. A brief review of the facts (which are shown in more detail in the accompanying memorandum) is necessary to place my constitutional claims in context. The conviction grew out of an incident which occurred at about 1:00 A.M. on October 7, 1968. At that time I was driving a car with Robert Bornholdt, a casual acquaintance, as a passenger. We were on our way to the Arthur Discotheque at 154 East 54th Street in the borough of Manhattan. It was raining hard. I drove through a red light at the corner of Fifth Avenue and 54th Street, where Patrolman John Varecha was on duty. I did not know at the time that Patrolman Varecha was there, or that he commandeered a taxicab and followed me.

5. I parked the car I was driving in front of Arthur's and was walking to the door of the premises when I was stopped by Officer Varecha. In response to his question as to whether I had just arrived in the car I answered flippantly, "no, I came by truck", believing him to be on duty near Arthur's and to be making casual joking conversation. Officer Varecha grabbed me by the arm and pulled me down three steps that led to the doorway to Arthur's.

I then told him to take his hands off me; to give me a ticket if he wanted to, but not to touch me. "If you want to give me a ticket, fine, but keep your hands off me". When I realized that he was concerned about my having driven through a red light, I drew him aside and attempted to persuade him not to issue a traffic summons. I told Bornholdt to stay out of the discussion.

6. At the trial the prosecution adduced testimony that after having been pulled down the stairs by Varecha, I purportedly grabbed the patrolman by the lapels of his coat and lifted him off the ground telling him, "get your hands off me". At that point, Varecha is supposed to have said, "O.K., if you won't show me your license, I'll have your car towed away". There was testimony that a scuffle later ensued, that I kneed the patrolman in the groin, that he then stated that we were under arrest and clubbed both Bornholdt and me with his nightstick. Bornholdt then fired several shots at the patrolman with a handgun, wounding him fatally, and ran from the scene. I left a few moments later. Bornholdt and I were separately apprehended shortly afterward, he with the gun still in his possession. I had no gun or other weapon in my possession.

7. The true facts were that when Officer Varecha asked me for my driver's license and registration, Bornholdt approached him, put his hand on the officer's shoulder and reached for his wallet to show his own driver's license.

(I had no New York license at the time.) The officer, apparently believing that he was being attacked, grappled with Bornholdt; I pushed between, and separated them. I then told Bornholdt: "stay out of this, I'll take care of it". I turned to the patrolman in order to calm down the situation, but the patrolman struck me on my face with his nightstick. Bornholdt too, was struck with the nightstick and momentarily knocked unconscious on the sidewalk. When the policeman stated that we were under arrest I continued to try to calm the patrolman. The patrolman advanced towards me, in what I would describe as an offensive-defensive crouch, not bent over in pain, as described in some of the testimony. Believing he intended to strike me with his nightstick again, I backed away from him with my hands in the air. However, I followed his instructions and put my hands against the wall in an adjoining alleyway. At that point the shooting occurred and Bornholdt ran away. I remained against the wall until I saw men coming from Arthur's with guns drawn. At that moment, believing my life was in danger, I decided to run from the scene.

8. At no time during the incident did I knee Patrolman Varecha in the groin or otherwise strike or touch him, except as stated above when I pushed between him and Bornholdt. I was as shocked as the witnesses by the shooting of the police officer.

9. The New York felony murder statute, New York Penal Law §125.25 subd. 3, contains an affirmative defense, which, pursuant to Penal Law §25.00, must be proved by the defendant by a preponderance of the evidence.

10. The affirmative defense is established by showing that the defendant 1) did not commit the killing or solicit, cause or aid its commission, 2) was not armed, 3) had no reasonable ground to believe any other participant was armed and 4) had no reasonable ground to believe any other participant intended to engage in conduct likely to result in death or serious injury.

11. The true facts would have established affirmative defense and my innocence of any underlying crime as well: I did not kill the officer, nor did I in any way participate in the killing; I was not armed; I did not know that Bornholdt was in possession of a gun; and since we were simply going to the discotheque for a drink, I had no reason to believe that Bornholdt intended to engage in dangerous conduct.

12. Because I had an extensive criminal record, my attorney moved at trial for an order limiting cross-examination in the event I were to testify. The motion was summarily denied, and with the advice of my attorney I concluded that it would be a mistake to testify, and did not. My defense,

therefore, had to rest almost completely on the testimony of prosecution witnesses.

13. In order to prosecute for felony murder, the prosecution formulated a complex theory: my alleged kneeling of the patrolman would be a felonious assault (Penal Law §129.05 subd. 3), for which we were placed under arrest. An escape from that arrest for a felony would be escape in the second degree (Penal Law §205.10 subd. 2), one of the crimes specified as a predicate felony in the felony murder statute (Penal Law §125.25 subd. 3).

14. The entire structure of the felony-murder charge therefore rested on testimony that I kneed Patrolman Varecha in the groin. The principal witness of that purported assault was a bystander, Francisco Garcia. Mr. Garcia, within a few hours of the incident, had given two detailed statements of the incident. One was given to a detective, who made extensive handwritten notes which were later typewritten. The other (which was stenographically recorded) was given to an assistant district attorney. In neither of these statements did the witness refer to the patrolman being kneed in the groin. At the trial my attorney attempted in a variety of ways to impeach the witness by showing that the crucial fact (the kneeling) had been omitted in both of the witnesses statements, but the trial court ruled that such impeachment was inadmissible. A copy of the detective'

handwritten notes are annexed hereto as Exhibit A. A copy of the notes as typed is annexed hereto as Exhibit B. A copy of the transcript of the question and answer statement given to the assistant district attorney is annexed hereto as Exhibit C.

15. At the close of the trial my attorney requested an instruction that in order to convict me of felony murder, my intent to escape must have been formed prior to or contemporaneously with the shooting of Officer Varecha. Otherwise the shooting could not be "in the course of, and in furtherance of" the underlying felony of escape. The court refused to give the instruction, even though it was again requested when the jury returned several times for further instructions about the law of escape. The last inquiry from the jury showed its concern (and confusion) about the matter by asking:

"As a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?"

16. My confinement is in violation of the Constitution of the United States in that:

A. At the trial the court declined to charge the jury that the prosecution bore the burden of negating the affirmative defense to felony murder set forth in New York Penal Law Section 125.25 subd. 3, and instead charged the

jury, pursuant to Penal Law Section 25.00 subd. 2, that the defense bore the burden of proving the affirmative defense by a preponderance of the evidence. The statutes imposing that burden deny due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

B. My right to confront witnesses guaranteed by the Sixth and Fourteenth Amendments was denied when the trial court refused to permit impeachment of Francisco Garcia by showing that in two detailed statements given immediately after the incident he omitted a crucial fact about which he testified at trial.

C. I was denied due process guaranteed by the Fifth and Fourteenth Amendments when the trial court refused to instruct the jury with regard to the meaning of "in the course of an in the furtherance of" in the felony-murder statute and to explain its significance, despite the requests by counsel and questions from the jury. The jury convicted me believing that the fact of my running away after the shooting itself was enough to establish my guilt.

17. Each of the grounds set forth in paragraph 16 above were presented to the New York state courts at trial and in each appeal.

18. By notice of motion dated April 30, 1976, I moved the New York Court of Appeals, pursuant to Section 500.9(b) of the Rules of that court, for permission to move

for reargument more than 90 days after the original decision, and on reargument for an order reversing my conviction, on the ground that Mullaney v. Wilbur, 421 U.S. 648 (1975), had held that due process was denied by the shifting to a defendant the burden of proving an affirmative defense. Permission to make the motion was denied on June 15, 1975, motion No. 516. A copy of that decision is annexed hereto as Exhibit D.

19. No other petition or appeal is presently pending in any court with respect to my judgment of conviction.

20. I have no other or future sentence to serve after completion of the sentence on the judgment under attack.

21. No previous application has been made to any court for a writ of habeas corpus or similar relief.

WHEREFORE, petitioner prays that the Court grant him the relief to which he is entitled in this proceeding.

Dated: New York, New York
August 5, 1976

Albert Victory
ALBERT VICTORY

Henry Winestone
HENRY WINESTINE
WILLIAM E. HELLERSTEIN
Attorneys for the petitioner
The Legal Aid Society
15 Park Row
New York, New York 10038
(212) 577-3420

10/67

SUPREME COURT
NEW YORK COUNTY
PEOPLE'S EXHIBIT
IN EVIDENCE
MICHAEL J. NICCELL
OFFICIAL STENOGRAPHER

~~Franko~~

Francisco Garcia, 36
6911 14th ST
Lanham, Maryland
301-459-6032
leaving for Md Tues.

hair stylist
Mr Franko
301-474-4900
Hairstylist
6000 Greenbelt
Greenbelt, Md. Rd

Wife in Arthur's. Started
leaving rainy + canopy.
2 guys approached club.
coming from ^{brown} Academie -
white tan top.
~~Common~~ didn't see get out
wit w/ wife + 2 neices
2 men white

Saw cab stop + policeman
in uniform. A light

cop: let me see your
regis + drivers lic.

dark suit + dark hair:

What car I was not
driving", spinning key

+ I cop put sh

man in blue

Saw man

"man in blue threw

the first blow" of last

before then man in ~~to~~ tan
jumped in.

Garcia

15 a

d tried to put ~~the~~
v wall on East. &
p+k kicked & holding
himself in ~~the~~ groin
kicked in scuffle. w/ stick.
after scuffed w/ stick
took

at ~~the~~ Lewis Midtown
Motel. RM 429-7

Angelo Greco.

heard 2 louder shots.
then 5 rapid shots
NJ here also heard shots
that way.

~~John brought back~~
~~She said~~

in sta hae : let tell
them that I told you
to get the police

[STATEMENT OF FRANCISCO GARCIA -
HANDWRITTEN NOTES OF DETECTIVE BRYNE]

NEW YORK COUNTY
PEOPLE'S EXHIBIT
23
FBI IDENT.
IN EVIDENCE
MICHAEL J. MCCOY
OFFICIAL STENOGRAPHER

17 a

MAJOR CASE INTERVIEW SHEET

61# _____ 17TH DETECTIVE SQUAD CASE# _____

Date & Time Interview 2:15 PM 10/7/68 Questioned By Det. Byrne Where 17th Squad

Name Francisco Garcia B# _____

Sex M Color W present age _____ Date of Birth 36-7/14/32 Birthplace N.Y.C.

Height 5'7" Weight 152 Hair Blk Eyes Brn Facial Marks _____

Address & Apt. # or floor 6911 142nd St. Latham Mch Midtown 48th St

Tel. # 459-6032 Residence _____ Tel. # _____

Previous Address _____ Married ? _____

Wife's First & Maiden Name _____

Children Name & Age _____

Father's Name & Address _____ Tel. # _____

Mother's First & Maiden Name _____

Brothers & Sisters Name, age, address _____

Occupation Hair Stylist Name of Firm Self Tel. # 301-474-4900 (Mex)

Address 6000 Decubolt Rd How Long Employed _____

Name & Address _____

Previous Employment _____

Year of Auto	Make	Color	Lic. Plate Number
Oper.		Other Autos of his	
Chauf. Lic			

Associates _____

Member of Clubs, Societies _____

Name & Addresses _____

Loan Companies _____

Education _____

Schools _____

Previous Arrests _____

Record Check B.C.I. _____ Operator _____

Record Check I.U. or other units _____ Operator _____

the other guy (Dum) who had used
 his club - I jumped on Tan guys
 back & the Tan one struck him
 & kicked him in the groin &
 the Tan one said mind your own
 business - & get the hell out of
 here - The Diner kept on walking
 esp the SF & the cop took out
 his gun & said - If you don't
 stop I'll shoot - he kept on walk-
 ing into the alley Luring the men
 into the alley ~~while I was~~
 & the Tan one followed cop
 into the alley ceiling. Cop &
 both going in opposite direction Luring
 him further in alley - & the Tan one
 kept yelling & cursing at me
 to get out of here - with his
 right hand he went to his side
 & at this point my wife yelled
 & screamed for me to come out. I
 was at entrance to alley & turned
 my head in her direction

I heard shots in rapid order
 & I looked in the alley & I saw
 the flash of the last shot come
 from where the tan guy was standing.
 I then fell to the ground voluntarily
 & the two men & I then got up &
~~and~~ ~~toward~~ took a couple of steps
 toward the Club - yelling: Call the
 Police & two men coming out
 the club - pulled their revolvers
 out & identified themselves as
 policemen while running toward
 & past me after the perpetrator.
 I then saw the wounded officer
 staggering out of the alley with
 his gun in his hand. & I ran
 & grabbed him & said I was
 helping you, relax let me hand
 the gun. He collapsed ~~so~~ & spoke
 to me but I don't ~~know~~ know
 what he said. Breathing heavy
 a woman came running over with
 some coats & knew who said he was
 a Dr. - let me look at him

...The sister took off her gun - & we turned
him over & she examined him & said
he was shot in chest - There help
Dane -

[STATEMENT OF FRANCISCO GARCIA-
TYPED VERSION OF NOTES OF DETECTIVE BYRNE]

SUPREME COURT
NEW YORK COUNTY
PEOPLE'S EXHIBIT
26 FOR IDENTIFICATION
IN EVIDENCE
MICHAEL J. MICHAEL
FACIAL

22 a

MAJOR CASE INTERVIEW SHEET

64# 17TH DETECTIVE SQUAD CASE#

Date & Time Interview 2:15 PM 10/7/68 Questioned By whom Det. Byrne Where 17 Squad

Name Francisco Garcia Alias Alais B#

Sex M Color W present age 36 & Date of Birth 2/14/30 Birthplace NYC

Height 5'7" Weight 150 Hair Brn Eyes Brn Facial Marks

Address & Apt.# or floor 6811 Byle St Lanham, Md

Tel.# 301-459-6032 Summer Residence Tel.# staying at Midtown Inn 48 St & 3rd Ave.

Previous Address Married ?

Wifes First & Maiden Name

Children Name & Age

Fathers Name & Address Tel. #

Mothers First & Maiden Name

B rothers & Sisters Name, age, address

Occupation Hair Stylist Name of Firm Self Employed Tel. # 301-474-4900

Address 6000 Greenbelt Rd. Lanham, Md How Long Employed 301 474-2371

Name & Address Previous Employment

Year of Auto Make Color Lic. Plate Number

Oper. Chauff. Lic Other Autos of his

Associates

Member of Clubs, Societies

Name & Addresses Loan Companies

Education Schools

Previous Arrests

Record Check B.C.I. Operator

Record Check I.U. or other units Operator

After 1 AM 10/7/68 I was coming out of Arthurs with my wife, niece (Theresa Gentry and another girl Maureen LaGuardia) and it had just started to rain and I saw a brown cadillac drive up and these two guys get out of the car and start to enter the club and a cab drove up and a policeman jumped out the cab and pointed his club at them and said Let me have your drivers licence and registration and the driver (blue suit) laughed at him and said who me I wasn't driving no car and started to enter the club. The policeman put his club across them and said Come on let me have your drivers licence and registration and Blue suit said I wasn't driving the car and the cop said said one of you ~~was~~ was driving that car and then the cop said "All Right I'll have your car towed away and turned around to leave and the driver followed him talking to him and the cop put his club up lengthwise and pushed him away and the driver grabbed him by the ~~tan~~ coat, pushing the policeman and the one in tan edged along side of the policeman. The policeman grabbed the driver and the one in tan started hitting him (policeman) with his fists. Meantime I was about four feet behind the tan one and the policeman twirled around and struck the tan one with his club while holding on to the one in blue and struck the tan one over the head knocking him to the ground and then the cop hit the driver who he was struggling with over the head with his club. I jumped on the tan guys back and the tan one struck me and kicked me in the groin and about my body several times and said Mind your own business and get the hell out of here. The driver kept on walking up the street after breaking away from the cop and the officer said if you don't stop I'll shoot but he kept on walking into the alley and the tan one followed the officer and the blue one into the alley circling the officer and both going in opposite directions going further into the alley and the tan one kept yelling and cursing at me to get out of here and made a motion with his right hand to his side. At this point my wife yelled and screamed at me to come out. I was at the entrance to the alley and turned my head in her direction and I heard shots in rapid order and I looked back into the alley and I saw the flash of the last shot come from where the tan guy was standing. I then fell to the ground voluntarily and then got up and took a couple of steps toward the club yelling "Call the police and two men coming out of the club pulled revolvers out and identified themselves as policeman while running toward and past me after the two men. I then saw the wounded officer staggering out of the alley with his gun in his hand and I ran and grabbed him and said I ~~am~~ am helping you, relax, let me have the gun-he collapsed and spoke to me but I don't know what he said, he was breathing heavy. A woman came running over with some coats and a man who said he was a Doctor said "let me look at him and we turned him over and the Dr examined him and said he was shot in the chest- then help came.

I saw blue suit brought back by the detective and recognized him as the one who had grabbed the police officer by the coat.

I saw the Tan one in the station house when I arrived there.

[STATEMENT OF FRANCISCO GARCIA-
TRANSCRIBED STATEMENT TO
ASSISTANT DISTRICT ATTORNEY DANNETT]

24 a

Statement of: Francis Garcia
Made to: A.D.. E. Dannett
Stenographer: Joseph Le Page
Date and Time: October 7, 1966 4:45 a.m.
Place: 17th Detective Squad
Present: Det. E. DiPasquale, #1251, 17th Sqd.
Det. A. Smith, #1891, Bantamouth

By MR. DANNETT:

Q My name is Ken Dannett and I'm an Assistant District Attorney assigned to the Homicide Bureau in New York County. I'd like to ask you some questions about the shooting of John Veccha this evening about 1:10 a.m., on the morning of October 7th, about 1 o'clock in the morning. Where were you?

A I was leaving Arthur's Club on 54th Street.

Q Whom were you with?

A My wife and two nieces.

Q That was about 1 a.m.?

A 1 o'clock.

Q Arthur's is located at East 54th Street in Manhattan?

A Yeah.

Q Did there come a time you were outside Arthur's?

A Yes I was standing right outside. In the meantime two fellows approached having come out of a Cadillac.

Q Was the Cadillac parked?

A It was parked on the curb, brown, chocolate brown, light top convertible.

Q Did you see the car pull up?

A I didn't see the car pull up.

Q Did you see anybody get out of the car?

A I seen them coming from the direction of the car.

Q Who did you see coming from the direction of the car?

A Two fellows, one in a tan suit, sandy hair and one in a dark suit, dark hair.

Q What happened next?

A In the mean time they started going into the club. A cab pulled up right then and right after that a policeman jumped out and ran up to them and said pointing his club as he was approaching, let me see your driver's license and registration. He mentioned going through a light, going through lights or whatever he said. He approached them pointing a stick to stop them from entering the club in a polite way, like nice way. He said let me see your registration and license and he repeated it. One guy said he wasn't driving.

Q Which one said that?

A The dark suit and dark hair. He was twirling the key in his hand. It was a gold plated key because we were right there at the time this was happening. He joked about

it, I wasn't driving no car and the policeman said let me
said your driver's license for going through a light. He
said I wasn't driving. He said one of you two were driving
the car. I'll have your car towed away and he started to
turn to go away. As he turned away the guy in the blue
suit said wait a minute, wait a minute.

Q This one in the blue suit is the guy in the dark
suit and dark hair?

A Right. He said hold it buddy like he was gonna
make a bribe attempt.

Q Did you see him put his hand on him?

A Yes.

Q What happened next?

A He started to go over to him say buddy and more
or less started to manhandle the policeman.

Q Where did he put his hands on him?

A You know, just like this.

Q On his arm?

A Just the way --

Q On his arm?

A Yeah. When the policeman went to grab him like
you know, stop pushing me and this guy went like this and
grabbed him.

Q Who did this?

A The guy in the dark blue suit grabbed him.

Q He grabbed the policeman?

A Right here.

Q On the collar?

A And like picked him up and took control of the policeman right then momentarily you see and the policeman and him like they were dancing a little bit. In the meantime the one --

Struggling?

A Like a little dance.

Q Struggling?

A Like struggling. The one with the tan suit was also watching the policeman.

Q The other man?

A The other man in the tan suit and sandy hair he kept going on the side of the policeman and the policeman started facing towards him but he kept going to the side of him, you see and he looked like he was just waiting, I shouldn't say that, he looked like he was waiting to do something.

Q Just tell us what you remember.

A I don't want to forget, somebody might ask me later on and I kept saying someone has to stay with the policeman. I kept staying behind the man with the tan suit.

Q You were behind the man with the tan suit?

A With the tan suit and you could see something was going to happen right then. They looked like they were gonna jump on the policeman.

Continue.

A They started a little bit more and moved a good 25, 30 feet to the next awning.

Q Going east or west?

A Going west. At the time the guy with the tan suit, the policeman grabbed the guy with the blue suit and said you're under arrest or something similar to that. I don't know what he said. He grabbed him. He made a statement okay, now you're under arrest or something similar to that. Right then after the statement the guy with the tan suit started pouncing on him and both, all started going around.

Q The man with the tan suit pounced on the policeman?

A They started hitting the policeman. The policeman very firmly swung the tan guy around you see and as he swung him around he hit this guy like this.

Q He hit the man with the tan suit?

A He was holding the other man with the club over the head and bang the man in the tan suit and he went down. And then he pushed this guy and hit him with the club, the guy with the blue suit. At that time I jumped on the man with the tan suit, you see and the guy with the tan suit, I grabbed him like this.

Q You say you put your hand around him from behind?

A I got him from behind, you see, and said let's leave the cop alone, etc, etc, and he turned around and very

powerfully knocked me off. He hit me in the chest and kept cracking his hand and he kicked me several times. I got a bruise on my back. I don't know where I got that from. So he was kind of little dazed and was going towards the policeman. The other fellow with the dark suit kept walking, that's what kept the policeman and he took out his gun and said now you're under arrest stop or I'll shoot and the guy kept walking.

Q In which direction?

A West, then he walked south into the alley luring the policeman into the alley and he kept pressing the other guy, the guy with the tan suit.

Q What do you mean?

A The policeman kept going in there after him and the guy in blue kept circling a little ring around the policeman. The guy with the tan suit kept going into the alley and kept trying to get him.

Q Where was the man with the tan suit? What was he doing?

A Going into the alley after the policeman not frontally at a side angle all the time. The other man got, the cop got the man with the blue suit against the wall now and said stop it now.

Q Who said that?

A The cop said come on or I'm gonna have to shoot you. By that time, he was right there at that time and he

and he told the guy several times, he was being real nice, overly nice, the policeman, these two guys attacking him you see so then this guy kept telling me to get the hell out of here it's none of your god damn business and he was cursing and all that. I kept going in there. When I saw the policeman with the man with the gun I stayed at a distance.

Q What happened next?

A I was around 7 feet away.

Q Did you yourself go into the alley?

A I stayed at the entrance.

Q How far into the alley was the man with the blue suit?

A Twelve feet.

Q What happened next?

A 12, 15 feet. The other man was from the man in the blue suit, the man in the tan suit was about four feet into the alley but on an angle towards the policeman.

Q They were in a triangle?

A Triangle.

Q What happened next?

A The policeman said stop or I'm gonna have to shoot you now, and this other fellow kept --

Q Who's the other fellow?

A The guy with the tan? My wife yelled for me to come on, you know. I went to turn around like this and she started screaming. As I started running there was a couple of shots.

I heard a rapid fire. Off-hand I counted five shots (witness earlier sounds like a gun being fired).

Very rapid?

Rapid fire. I've been in the service I know what a rapid fire is. It only could be like a machine gun or automatic weapon (witness again making noise like a weapon being fired) rapid fire. In the meantime I turned around and as I was turning when I heard the shots and I saw a flash, you understand, at that time I turned and started dropping. I don't know which one I did first. I started running and yelling towards the club screaming and everybody's screaming and two men started drawing their pistols and running five or six steps. I turned around and the guys had come out of the alley already but before I started going to the club this guy turned around with the tan suit and he had a black object in his hand.

Could you see what that black object was?

I do not know after where the big fire came from like, you know --

You saw a flash when you turned around?

When I heard the first round going off at the entrance of it I saw a flash.

From which direction did the flash come?

The direction of the man with the tan suit. The tan man was in an angle like this.

What do you mean?

A At the part I saw the flash was like it blinded me.

Q You saw a flash coming from the man in the tan suit who was standing there?

A In a position more like this I seen this part of him.

Q Right or left side?

A Like this.

Q Did you see him with the hand extended?

A This is the object I saw like this.

Q You're indicating to me with your hand extended in front of you, is that correct?

A Yes.

Q What was towards whom?

A At the officer.

Q Where was the hand in relationship to the flash?

A I only seen his whole body and the flash. I didn't see his hand you see but you're not going to see the hand after he fired it.

Q How was he standing?

A I was like this, you lean forward like this towards him and the bang came from that direction.

Q You seen him leaning towards that direction?

A He was more of an angle, more like this.

Q He was closer to the wall, the officer?

A He was a couple of feet from there. I was on an angle from there where I could see his whole body.

Q You could see his whole left side?

A I don't know his left side or right side. I saw him stretch out like this. I don't know if it was the left side or right side I don't know.

Q He was stretched out towards the policeman? At the time you saw the flash?

A Right.

Q When you saw the flash did you hear a report, a shot.

A I heard the shooting. I was like this. I turned around like this and I think I hit the floor and started running at the same time.

Q For the record, your name is Francis Garcia. You live at 601 Lyle Street, Lanham, Maryland?

A Yes.

Also for the record, the other people in the room are Joe Lorage, the stenographer who is taking all this down and Detective Al Smith from Manhattan South Homicide and Detective DePasquale from the 17th Squad.

Q What happened next? Which way did they run?

A Well I started running toward the club. I took several steps.

Q When you ran east?

A I yelled call the police. I seen two guys running out of the entrance of the club and drawing their guns.

Q The entrance of what?

A Arthur's. They were drawing their guns. I turned around and take five steps or something and the policeman let's say I was at the door at the time and the policeman went like this.

Q The policeman that was in the alley?

A He was shot, and got there.

Q Was he still in the alley when he fell?

A Just at the entrance.

Q Did you see which way they ran?

A At this time right before he fell the one with the tan suit came running out real fast and shot up straight. *this guy went in between two cars.

Q Let's take each man. The man in the tan suit which way did he go?

A He ran out, took a couple of big steps right past out of the alley and turned and started running up the street.

Q Which way?

A West. He dodged in between some parked cars. At this time I heard a couple of shots being fired from one of the policemen's revolver.

Q Which way you saw the man in the blue suit run?

A The man in the blue suit was hugging the wall and ran up straight up the sidewalk west.

Q They both ran west?

A Yeah.

Q You saw both of them go west, is that correct?
Which side of the street were they running on?

A South side, the man in blue was running on the south side and the man in the tan was running in the street.

Q Where did he go to, the man in the tan suit?

A West.

Q Did you see where he went finally?

A No I was holding the policeman.

Q Did you see where the man in the blue suit went?

A He went west on the sidewalk?

Q End of statement.

5:05 a.m.

1-53170 316
[STATEMENT OF FRANCISCO GARCIA-
GRAND JURY TESTIMONY]

POTENTIAL
IN EVIDENCE
MICHAEL J. MICHELL
OFFICIAL STENOGRAPHER

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FRANCISCO GARCIA, called as a
witness, having been first duly sworn, testified
as follows:

BY MR. DERMODY:

Q Try to keep your voice up so that
everybody in the room can hear you. Will you give
us your full name and address, please?

A Francisco Garcia. I live at 6911 Lyle Street,
Lanham, Maryland.

Q Are you married, sir?

A I am married.

Q What is your business or profession?

A I am a hair stylist.

Q And do you own and operate some beauty parlors
in your home town in Maryland?

A Yes, I do.

Q How long have you been residing in Maryland?

A Ten years.

Q Do you have any children, Mr. Garcia?

A I have five.

Q Mr. Garcia, I direct your attention to the
evening of October 6th and the early morning of October

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7th of this year. Do you recall those dates?

A Yes, sir.

Q Now, sometime around that time did you have occasion to come from Maryland and visit New York City?

A Yes, I came here for a hair stylist convention in New York City.

Q When did you drive in New York City?

A I arrived around ten o'clock Saturday night.

Q That would October the 5th?

A October 5th.

Q Did you stay at a hotel with your wife?

A Yes, sir.

Q Now, directing your attention to the late evening of October 6th and the early morning of October 7th, did you have occasion with your wife and other people to visit and an establishment known as Arthur's Discotheque on 54th Street, between Third and Lexington Avenue?

A Yes, sir.

Q And about what time would you say you arrived at Arthur's Discotheque, approximately?

A Approximately around eleven to eleven fifteen.

Q That would be the evening of October 6th, is that correct?

A Right.

Q And who was in your party at the time you arrived at Arthur's Discotheque?

A It was me, my wife, my niece Therese, Maureen, a friend of mine Angelo Greco and another friend of mine Robert.

Q And after you arrived at Arthur's Discotheque did there come a time when any of these people left, but you didn't?

A Around 12:30 Robert and Angelo left to go some other place.

Q Leaving you, your wife and these two other young ladies?

A Yes.

Q Did there come a time when you and your wife and the other two young ladies left Arthur's Discotheque?

A Yes, right after.

Q About what time would you say that was?

A At one o'clock, right around one o'clock we decided to leave.

Q We are now into the early morning of October 7th, is that right?

A Yes, sir.

Q Will you tell us what happened as you were leaving Arthur's Discotheque what attracted your attention?

A We came right out the store and there is an awning out there and it was raining very very hard, so we stood there just saying like, we'll have to get the car. Maureen had a little Volkswagen and she had it parked around the corner.

Q While you were standing there and having this conversation did something attract your attention?

A Well, right then as we were standing underneath the awning I heard the salmming of the doors of a car and glanced over. ✓

Q Did you notice what kind of a car that was?

A It was a cadillac, late model cadillac.

Q I direct your attention to Grand Jury Exhibit number 2 in evidence and ask you to look at the car in that photograph and tell me if you can recognize the car?

A Yes, that is the car that I seen there.

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Q And you say you heard the slamming of doors?

A Slamming of doors almost immediately together like--

Q And what if anything did you notice?

A And then I noticed coming from around the driver's side this fellow with a blue suit coming like -- mor like running and sort of clowing around and saying ~~XXXXXX~~ something to this fellow coming from the other side with a tan suit, and they ran right underneath the awning.

Q Before we go any further, I am going to show you some photographs and see if you can recognize them. Directing your attention to Grand Jury Exhibit number 4 in evidence. I ask you to look at the photograph and tell me if you recognize it?

A Yes, this is the man that I saw with the dark colored suit coming from the side of the driver's side of the car.

Q Do you know now the name of that man?

A The name I think is Victory.

Q Directing your attention to the other Exhibit which is Grand Jury Exhibit number 5 in evidence--

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A And this fellow right here in front of me with the tan suit came from the passenger side. At that time he was wearing a yellow -- large glasses yellow like. Hippie sort of pair of sun glasses.

Q And what color suit?

A He had a tan suit, and he had sort of tan sandy hair

Q When these two men got out of the cadillac, I think you testified that they were clowning or joking?

A Yes, they came running underneath there like more or less clowning with each other.

Q Were they talking to each other?

A Yes.

Q What happened at that point?

A At that point more or less like sort of ran past us underneath the awning and gave the girls, me and my wife a look like sort of eying us up and down. And I turned and looked at them and they started at the entrance of the discotheque. It was blocked by a man, the doorman had the door halfway open just around this much. And he was talking to a fellow in the entrance, a fellow around six foot three wearing those

Garcia 19

hippie glasses.

Q What happened as these two men whom you have identified as Victory-- by the way, this other picture that you looked at, do you know the name of the--

A That picture, I think his name is Bornholdt.

Q When Bornholdt and Victory were at the entrance of Arthur's Discotheque what was the next thing that happened?

A Right at that time they just got to the entrance of the door and a cab pulled up, a policeman came out of the cab and said, "Hey, let me see your license and registration". And they looked, "ha, ha, we were not driving no car". At that time I turned around and looked at Victory with the blue suit turning around the keys in his hand going like this --"we weren't driving no car". The policeman said just let me see your registration and license, you went through a couple of lights and I want to see your registration and license.

Q Now, this Officer, was he in full uniform?

A The Officer was in full uniform. I mean he had his hat on, a rain coat and badge, and he had his club

in his hand.

Q I direct your attention, Mr. Garcia, to Grand Jury Exhibit number 3 in evidence and ask you to look at that photograph and tell me if you recognize the person in that photograph?

A Yes, I do.

Q Is that the Patrolman?

A Yes.

Q He was talking to the two defendants?

A Yes, that is the patrolman.

Q Go ahead, continue.

A And as he said, "I only want to see your registration and your license. You went through a couple of lights". They said we wasn't driving, spinning the key with his left hand. We wasn't driving nothing. Maybe they were. Pointing to me and my wife and the two girls sort of. And we looked at him -- you know, when he said this. And the policeman said "All right, I'll have your car towed away". And he turned around and started walking towards the car.

Q This cadillac that you just identified?

A The cadillac that was at the curb.

Q What happened then?

A At that time the man in the blue suit--

Q Is that the man that you now know to be Victory?

A Yes, he came off the steps and went around to the policeman. He said, "Now, listen, we didn't do nothing". He put his arm around the patrolman, he went around like this holding the patrolman. He said, "We didn't do nothing -- come on". You know, sort of shaking the policeman. The policeman was trying to push him away. As the policeman pushed him away he grabbed--Victory grabbed the policeman by the collar of his rain coat, really hard, and said, "Keep your F'n hands off me, don't touch me". And picked him up and grabbed him like that, and had control of the officer at the time. At this time the fellow with the tan suit--

Q The man you now know to be Bornholdt?

A I would say tan suit because I can't pronounce his name too good. The man with the tan suit started grabbing the officer at that time. I observed and doing what I thought was right, I watched it very closely and I got behind the tan suit to be assistant to the police officer. Victory was holding the police officer and

the police officer was not under control. Victory had control of the Police Officer by the collar and he had his arms like, like--the policeman finally shock him off and they danced a couple of steps further west.

Q When you say "danced", you mean they were struggling?

A Yes, at that time the policeman pushed him away. He said, "Now, let me see your registration and license"?

A And he was - Victory was still saying, "Now, come on, we wasn't driving that car -- you know, come on give us a break". And all that. He said "Okay". They kept on walking, Victory kept on walking west sideways keep avoiding the policeman, keeping away from him -- you know, just a little bit, and the policeman kept going up the street. And the policeman said, "All right, you're under arrest". At this time the man in the tan suit said something to Victory.

Q Did you hear what he said?

A No, I didn't hear what he said.

Q Did Victory reply to the man?

A Victory replied at this time. I was always a foot or a foot and a half behind the man in tan in the

Garcia 23

rain watching it very closely what was happening because it looked like a real sneaking move. He was just moving very slowly.

Q Tell us what, if anything Victory said?

A He, Victory said something to Bornholdt, you stay over there I will take care of this. I have to stand because I talk with my hands.

Q Well, you heard Victory to Bornholdt--

A He said, "You stay there, I will take care of this". At that moment Victory went like this real fast and kicked the officer very hard, hitting the officer and grabbing and punching at that time. At that time Bornholdt jumped on the officer and I jumped on Bornholdt right then -- I didn't jump on him I was ready. The officer pushed him with his elbow stepping towards him like this, came back and hit him, hit him in the head and knocking him down to his knees.

Q What did he hit him with?

A With the club, with the policeman's club.

Q And this happened to Bornholdt?

A The fellow in the tan, he pushed Victory forward. When he was pushing Victory forward I jumped on Bornholdt. He pushed Victory against the car

and hit him over the head causing his head to bleed. And he went down a little bit. Victory started right away talking, getting out of here and all of this and moving this way. Bornholdt got up with me on his back. I was holding like this and pushed me like this and I kept on holding his hands. He turned around and kicked me in the groin, in my leg, in my stomach, and I don't know I got a bad bruise on the back. I don't know how that happened, and I kept on trying to hold him and he said, "get out of here, mind your own business".

Q Who said that?

A Bornholdt talking to me.

Q Now, just sit down a moment, Mr. Garcia. Directing your attention back to the time when you saw Victory kick the officer--

A The officer told him right before this--

Q Just listen to my question. Directing your attention to that part of your testimony where you say you saw Victory kick the officer very hard, what part of the body did his foot come in contact?

A In the groin very very hard.

Q In the groin?

Garcia 25

A ~~M~~ Right.

Q When the officer was kicked in the groin by the defendant Victory what, if anything did you see the officer doing?

A The officer at that moment said mostly-all the time crouched almost in half holding himself.

Q Where was he holding himself?

A In his groin.

Q And did you hear him utter sounds?

A He was growning all the time and trying to talk to them and at the same time saying "Now you're under arrest". And Victory, he was against the car, he kept moving like that sideways and he said come on stop get against the wall and tried to get them around him against the wall. At that time there was a hallway there and he started.

Q Is this Alley way a distance west of Arthur's Discotheque?

A Yes, it is west of it and he started to get -- trying to get Victory against the wall. At the entrance of the alley way Victory started moving towards the officer. He walked a couple of steps backwards into the alley and then he started coming towards the officer.

The officer had his gun out like that, he was struggling, the rain coat was real rough and he was hurt very bad and he was trying to hold himself and he said "Get against the wall". And then he grabbed Victory and pushed him like this and then held himself and finally got himself to get Victory to put himself on the wall, on the eastside of the alley at the entrance. Then he started to grab the fellow in the tan suit to put him against the wall. At that time Victory started to move inside the alleyway sideways. Further into the alleyway saying "Come on now, we didn't do anything and moved around ten feet into the alleyway, ~~XX~~ into the alleyway. When he started looking right outside of the alley way around fifteen feet the officer starting in after him, he said, looking at me, he said "Get the cop, get the cop". I said "I'm with him", and I touched the cop, that is how close I was. Bornholdt who was gone against the other wall--at this time Victory said to me get out of here so and so, it is none of your business, get the F out of here and kept on and walked around this big puddle all the way inside this alleyway, and the policeman was holding himself in the groin and said

Garcia 27

"get against the wall you're under areest, I am going to have to shot you if you don't get against the wall".

Q Where was Bornholdt at that time?

A He was side flanking this policeman all the time and I was right behind Bornholdt, around two foot and a half and the policeman told them to get against the wall you're under arrest. Now, come on now you're under arrest get against the wall.

Q He was speaking to both Bornholdt and Victory?

A Both of them and he had his gun up in the air sort of in this position facing up and holding himself and moaning all the time, really bad, and I said something to him. I said, you know, like you alright and he didn't say nothing, he said against the wall and I was holding himself, moaning real bad.

Q Tell us what haopened from that point on?

A This time Victory got against the wall on the west side of the wall, touching like this, and then came around and real fast and he said, "Get a cop, get a cop", or something like that, similar to that and Bornholdt was further at the entrance of the alleyway--you

Garcia 28

know he was around six feet from the entrance of the alleyway and I was more or less around five foot, three and half foot inside the alley. He turned towards me--

Q Who turned towards you?

A Bornholdt. Can I demonstrate this?

Q Yes.

A Bornholdt was facing the policeman on an angle. They were both trying to out flank this policeman. Victory was over there. They were keeping him at the reach of the other one. He couldn't face one at a time and finally Bornholdt turned to me and went like this with his coat and said "Now--

Q You're indicating by drawing your right hand across your waist?

A He was indicating like this. I thought he was going to grab a knife. Now, he said, "Get the F out of here and mind your own business", and dam and everything else. He was cursing.

Q Now, you're indicating by drawing -- Let me finish, Mr. Garcia. You're indicating Bornholdt by drawing your right hand across your waist and moving your coat pocket?

~~Garcia~~ 29

A Yes, that is what he done to me. At that time my wife was right in back of me, few feet, screaming and yelling and I turned around and I started to take a couple of steps backwards and I turned around and -- "Get the police, get help". Her screaming, my wife was screaming.

Q What did you do?

A At that time I started to take a couple of steps forward, still yelling and acreamng.

Q In which direction?

A Going out of the alleyway. I was right at the entrance of the alleyway when I heard the first shot fired. Then I heard a louder shot and I heard a burst of shots.

Q Was your back--

A My--

Q --to the alley at the time you first heard the shots?

A I was turned to the alley. I jumped on the floor and I looked at the alleyway and I saw ~~X~~ the position of the man in the tan.

Q That is Bornholdt?

A Facing the policeman on a direction like this

and I only saw a flash then, but I did see him going over towards the policeman like this or he might have been on this kind of an angle, but he was stretching over towards the policeman like this. I saw him. I was hitting the floor at the same time. I got up and started running, screaming and yelling.

Q In which direction were you running?

A I was running towards the discotheque. I took around three steps. There were two men coming, running from the discotheque at this time yelling, we are policemen. At that time--

Q Were these men in uniform?

A They were civilian clothes. I said they killed, they shot a cop.

Q How many shots did you hear altogether, would you say, as best as you can remember?

A I thought I heard around seven shots.

Q And these were coming from the alleyway?

A Right at that time I turned around and ran back towards the alleyway. That was only around three feet from me or four feet. I ran a couple of steps at that time, Bornholdt just ran right out in front of me holding a dark object in his hand and he was like running real

fast, turning still on the sidewalk and running up

Q In which direction had he run, west?

A They were running west.

Q That would be towards Lexington Avenue?

A At the corner of the alleyway a fellow in-- Victory just turned the alleyway and ran up the side of the wall also in a westerly direction. As soon as they started turning, started to run I heard a policeman fire one shot right close to me and then another shot.

Q Is this one of the men who said they were police officers who ran from Arthur's?

A One of the police, plain clothesman that was running from Arthur's fires right alongside of me. Bornholdt ran in between two cars and ran up the street and Victory ran up towards the sidewalk and the ~~XXX~~ two policemen ran very fast after them in plainclothes. Meantime while they were just coming out of the alleyway, the policeman had Bornholdt--

Q Is this the police officer whose picture you identified?

A The policeman that was in the alleyway had lost his hat and was coming down with his gun in his hand and it fell to the floor, and I told him I am the man

Garcia 32

that is helping you. I am your friend. Leave the gun, just give me the gun, and I put the gun on the floor and I helped him. The policeman said "I'm hurt".

Q Would you like a glass of water, Mr. Garcia?

A Yes.

Q Do you want to continue now or do you want to wait for a glass of water?

A The Policeman while he was on the floor said, "I'm hurt, I'm hurt, and he said Moma".

Q All right, Mr. Garcia--

A He was in a state of shock.

Q And what if anything did you do with the police officer. Did you hold him in anyway?

A I was holding him.

Q You say his hat was off?

A His hat was off. He was in a state of shock. He was looking straight up.

Q Did you take the gun from his hand?

A I took the gun from his hand and laid it ~~X~~ down on the floor and I like put my knee hiding it from the other people. And I held him and someone there got some jackets and I put it under his head and I was talking to him.

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Garcia 33

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Q While you were there with the police officer did there come a time when you saw this defendant Victory? Tell us about that?

A At that time when I was trying to comfort the police officer one of the plain clothesmen brought back Victory still bleeding from the head from the shot-- I mean from the stick that he got hit over the head. He got him against the wall and was holding him there and I said, "That is the guy that killed this cop. That is the guy". And I was yelling "that's him", and he was saying, "I'm only going to pick up my -- I'm only going to pick ~~XX~~ up my wife". And there was a man alongside of me holding an umbrella.

Q You say you saw the defendant Victory when he was brought back by one of these plain clothesmen. Did there come a time when you saw the defendant Bornholdt?

A Yes, when I got--

Q Where did you see him?

A Me and my wife entered the police station, and as we were walking in the police station they had him right there at the table and I said, "That's the guy, that's the S and B that killed that cop. That's him, that ~~is~~ the guy". and I kept screaming it.

Garcia 34

Q Just one question, Mr. Garcia. At the time you saw the police officer, before you heard the shot, did he have his uniform cap on?

A Yes, he had his cap on, and he had his club hanging down from his arm, and he had the gun on him.

MR. DERMODY: All right, Mr. Garcia, thank you very much.

(Witness Excused.)

[DECISION OF THE DISTRICT COURT
(WARD, J.), DATED MAY 31, 1977,
GRANTING THE PETITION FOR A WRIT
OF HABEAS CORPUS].

58 a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ALBERT VICTORY,

Petitioner,

-against-

ROY BOMBARD, as Superintendent of
Greenhaven Correctional Facility,

Respondent.

OPINION

76 Civ. 3493

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A P P E A R A N C E S

WILLIAM E. HELLERSTEIN, ESQ.
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038

HENRY WINESTINE, ESQ.
Of Counsel

ROBERT M. MORGENTHAU, ESQ.
District Attorney
155 Leonard Street
New York, New York

HENRY J. STEINGLASS, ESQ.
Of Counsel

WARD, J.

Albert Victory ("Victory"), a state prisoner, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. For the reasons hereinafter stated, the writ is granted.

On May 26, 1970, a jury in Supreme Court, New York County, the Honorable Irwin D. Davidson presiding, convicted Victory of felony murder. Petitioner was sentenced to twenty-five-years-to-life with a recommendation of no parole during the first twenty-five years, which he is presently serving at Greenhaven Correctional Facility. The conviction was affirmed by the New York courts. People v. Victory, 38 App. Div. 2d. 689, 327 N.Y.S. 2d 544 (1st Dep't 1971), aff'd sub nom., People v. Bornholdt, 33 N.Y.2d 75, 305 N.E.2d 461, 350 N.Y.S.2d 369, cert. denied, 416 U.S. 905 (1974). Victory's motion for leave to reargue in light of the subsequent United States Supreme Court decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), was denied on June 15, 1976. People v. Victory, ___ N.Y.2d __.

Petitioner asserts three constitutional claims for habeas corpus relief:

1. He was denied his sixth and fourteenth amendment right of confrontation by the trial judge's refusal to allow impeachment of testimony on a critical issue given by the principal prosecution witness;

2. He was denied due process under the fifth and fourteenth amendments by the trial judge's failure to instruct clearly on the meaning of an element of felony murder;

3. He was denied due process under the fifth and fourteenth amendments by being required to bear the burden of proof by a preponderance of the evidence on the four elements of New York's affirmative defense to felony murder.

FACTS

Felony murder charges usually arise out of a crime of violence or potential violence, the prototype being armed robbery which culminates in a shoot out. The apparent rationale for felony murder prosecutions is to deter felons from acting in such a manner as to increase the likelihood of violence (e.g., to deter carrying arms). For this reason, the law has come to accept punishing the non-killing accomplice to the underlying felony. The peculiar facts of this case, however, do not approach the prototypical felony murder scenario to which this rationale applies.

Sometime around 1:00 A.M. on a rainy October 7, 1968, the murder victim, Patrolman Varecha ("the Patrolman"), was

standing in uniform on the corner of 5th Avenue and 54th Street in New York City. He observed a car speed through a red light at that intersection. The Patrolman thereupon commandeered a cab which chased the speeding car a few blocks through another red light to its destination, Arthur's Discotheque, on 54th Street and 3rd Avenue.

Four people, Francisco and Donna Garcia, Theresa Gentry and Maureen LaGuardia, were standing under the awning at Arthur's when the car pulled up. In varying degrees they observed the incident that was about to unfold.

Victory and his co-defendant Robert Bornholdt ("Bornholdt") got out of the car, laughing and joking, and made their way toward Arthur's. At approximately the same time, the Patrolman alighted from the commandeered cab and demanded the license and registration of whoever had been driving the car. Victory, who had been driving without a license, "wised-off" with the Patrolman, telling him, while spinning the car keys around his fingers, that they had not come by car. When the Patrolman asked how they had come, Victory responded, "By truck." As they proceeded to ignore the Patrolman's demand and enter Arthur's, the Patrolman blocked their access with his nightstick and again demanded the license and registration. When Victory remained uncooperative, the Patrolman threatened to have the car towed away. At that point a verbal and physical altercation ensued.

The prosecution witnesses, particularly Francisco Garcia ("Garcia"), their main witness, depict Victory as the aggressor. Garcia testified that at some point Victory, after telling Bornholdt to stay out of it, that Victory would take care of it, lifted the Patrolman off the ground by his jacket and then kicked the Patrolman in the groin. The Patrolman doubled over in pain and then rose and clubbed both Victory and Bornholdt on their heads with his nightstick with such force as to cause them to bleed. The Patrolman then drew his gun and told them they were under arrest.

Instead of immediately submitting to the arrest, Victory slowly backed away. Bornholdt kept to the Patrolman's other side, preventing him from keeping his eyes on both of them. Throughout this entire time, Garcia remained nearby the Patrolman, and at one point earlier actually came to the Patrolman's defense and as a result was kicked and assaulted by Bornholdt. Garcia testified that Victory gradually backed down an alley, drawing the Patrolman, followed by Bornholdt, and Garcia, therein. While in the alley Victory shouted to Garcia "Get the cop, Get the cop," and/or "Get a cop. This guy is crazy." Garcia replied that he was with the cop. He was then ordered, first by Victory and then by Bornholdt, to get out of the way and mind his business. At the entreaties of his wife Garcia turned around to retreat. At that point the shooting began. When he turned back, Garcia saw Victory

and Bornholdt "scuffling" with the Patrolman and observed a flashing burst come from the silhouette of a gun in Bornholdt's hand. First Bornholdt, and then Victory, fled separately.

THE FELONY MURDER THEORY

Victory was charged with felony murder under N.Y. Penal Law §125.25 (McKinney 1967) ("Penal Law").¹

One of the elements of that crime is that there must be an underlying felony or attempted felony on which to predicate "felony murder," and the predicate felony must be one of the particular felonies enumerated in Penal Law §125.25. In this case the predicate felony was escape in the second degree.

Section 205.10(2) of the Penal Law defines escape in the second degree as flight from an arrest for a felony. Here the felony arrest that formed the basis for second degree escape was arrest for second degree assault.

Second degree assault is defined in Penal Law §120.05(3) as causing physical injury to a peace officer with intent to prevent him from performing his lawful duty. Physical injury is defined in Penal Law §10.00(9) as "impairment of physical condition or substantial pain." In this case, the physical injury forming the basis of the arrest for felonious assault was Victory's kicking the Patrolman in the groin.

In addition to having to prove beyond a reasonable doubt the kick in the groin, the arrest therefor, and subsequent flight and shooting, the prosecution also had to prove beyond a reasonable doubt that Victory's and Bornholdt's escape was pursuant to a common plan or intent to escape which was formulated prior to the shooting, and that the shooting was "in the course of and in furtherance" of the preconceived plan of escape.

CONSTITUTIONAL CLAIMS

1. Was Victory Denied His Right of Confrontation by the Restriction on Impeachment of the Principal Prosecution Witness

Petitioner claims that his constitutional right of confrontation was violated by rulings at trial which prevented him from demonstrating that in statements given the night of the murder Garcia did not state that Victory had kned the Patrolman in the groin.

As noted above, Victory's kneeling the Patrolman in the groin was the basis for the felony assault arrest, which was the predicate for the underlying felony of second degree escape on which the felony murder charge ultimately rested. Therefore, proof beyond a reasonable doubt of the kneeling incident was essential to a conviction for felony murder.

At trial, Garcia testified in great detail concerning the events which he witnessed on the morning of October 7, 1968.

On direct examination, Garcia stated that he saw Victory knee the Patrolman in the groin and he saw the officer crouch over in pain. In addition, Garcia stood in front of the jury and dramatically re-enacted his testimony of the kneeling incident twice more.

Before cross-examination began, the prosecution turned over to defense counsel, pursuant to People v. Rosario, 9 N.Y.2d 286, cert. denied, 368 U.S. 866 (1961), the following five pre-trial statements made by Garcia:

1. Handwritten notes taken by Detective Byrne ("Byrne") on October 7, 1968;
2. A typed revision of the notes taken by Detective Byrne;
3. Handwritten notes taken by Assistant District Attorney Dannett ("Dannett") dated October 7, 1968;
4. A transcript of an interview of Garcia by Dannett recorded by a stenographer at 4:45 A.M. on October 7; and
5. Garcia's statement to the Grand Jury in October 1968.

Two of these statements, the Grand Jury testimony and the handwritten notes of Dannett, contain references to the kneeling incident. In the Grand Jury, Garcia testified that it was Victory who kicked the Patrolman, while in Dannett's handwritten notes, the person doing the kicking was not identified.

The stenographically transcribed interview of Garcia by Dannett clearly contains no reference to the kneeling incident, but there was no specific question propounded on that subject either. The two statements taken by Detective Byrne are somewhat ambiguous. Detective Byrne's handwritten notes state as follows:

I jumped on tan guys [Bornholdt] back
& the tan one struck him & kicked him
in the groin & the tan one said mind
your own business -- & get the hell out
of here.

(emphasis added)

Petitioner contends that in this passage, Garcia was referring to the kick which Bornholdt gave to Garcia. The prosecution claims, on the other hand, that the word "him" refers to the officer and that it was the officer who was kicked by Bornholdt.² It should be noted that in the rest of the handwritten notes by Byrne, the Detective recorded Garcia's references to himself in the first person as "I" or "me" and not as "he" or "him." However, in the Detective's typed revision of the notes, the pronoun was changed as follows:

I jumped on the tan guys back and the
tan one struck me and kicked me in the
groin and about my body several times
and said mind your own business and
get the hell out of here.

(emphasis added)

This version clearly states that Garcia, not the Patrolman, was kicked by Bornholdt, not Victory, and the correction indicates that when Detective Byrne wrote down "him" he

understood it to mean Garcia, not the Patrolman. In sum, then, the handwritten and typed Byrne notes do not mention Victory's kicking the Patrolman.

On cross-examination at trial, Garcia repeated his testimony regarding Victory's kneeling of the Patrolman and the Patrolman's subsequent crouching over. Defense counsel wanted to impeach this testimony by demonstrating that Garcia had failed to mention the kneeling assault in the statements given to Byrne and Dannett. However, counsel's repeated efforts were all unsuccessful.

Petitioner claims that the trial court's limitation of the cross-examination of Garcia regarding his failure to mention the kneeling incident in prior statements violated his right of confrontation under the sixth and fourteenth amendments.

Federal habeas corpus review of evidentiary rulings in a state criminal trial is limited to errors of constitutional dimension. Cupp v. Naughten, 414 U.S. 141, 146 (1973); United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, 50 (2d Cir.), cert. denied, 423 U.S. 872 (1975); United States ex rel. Castillo v. Fay, 350 F.2d 400, 401 (2d Cir. 1965). Ordinarily, the trial judge has broad discretion in controlling the extent of cross-examination, United States v. Finkelstein, 526 F.2d 517, 529 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976); however, "this principle cannot be expanded to justify

a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." United States v. Harris, 501 F.2d 1, 8 (9th Cir. 1974), quoting Gordon v. United States, 344 U.S. 414, 423

The Supreme Court has recognized that the right to an effective cross-examination is an important aspect of the right to confrontation, Davis v. Alaska, 415 U.S. 308 (1974); Pointer v. Texas, 380 U.S. 400 (1965), the denial of which is a "constitutional error of the first magnitude" which "no amount of showing of want of prejudice would cure." Brookhart v. Janis, 384 U.S. 1, 3 (1966). Cross-examination is a crucial tool of defense counsel for testing the accuracy of testimony by prosecution witnesses. Davis v. Alaska, supra at 316. The use of prior inconsistent statements is an accepted means of impeaching the credibility of a witness. United States v. Hale, 422 U.S. 171, 176 (1975); 3A J. Wigmore, Evidence §1040 (J. Chadbourn rev. 1970). To omit a fact when it would have been natural to assert it on the prior occasion is inconsistent with the assertion of the fact at trial. Wigmore, supra; C. McCormick, Evidence §34 (2d ed. 1972). See also Jencks v. United States, 353 U.S. 657, 667 (1957).

The question before the Court is, therefore, whether the trial court's limitation of the cross-examination of Garcia deprived [petitioner] of a fundamentally fair

trial in violation of the due process clause of the Fourteenth Amendment." Welcome v. Vincent, Dkt. No. 76-2126 (2d Cir. Feb. 2, 1977). See also Chambers v. Mississippi, 410 U.S. 234 (1973).

Garcia was the prosecution's main witness, which made a full and searching cross-examination most essential. United States v. Brown, 546 F.2d 166, 170 (5th Cir. 1977). Furthermore, as emphasized previously, the kneeling incident was crucial to the prosecution's case, and the omission of any reference to it in two or three of the statements given the night of the incident is of utmost significance because under the circumstances it would have been natural to mention it. By contrast, at the time these statements were given, Garcia thought to mention many details which were literally minutiae in comparison to a kick which allegedly incapacitated or impaired the Patrolman and triggered the latter's response of clubbing Victory and Bornholdt over the heads and drawing his gun. Therefore, Garcia's omission of the kneeling incident in all but one statement would have reflected upon his credibility as a witness and might have raised doubts as to the credibility of the other witnesses who corroborated either the kneeling or the Patrolman's subsequent crouching over.

In addition, because defense counsel repeatedly laid the foundation without subsequent impeachment, "the

jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." Davis v. Alaska, supra at 318.

Nor, in contrast to Davis v. Alaska, supra, and Robinson v. Chesney, 403 F. Supp. 306, aff'd without opinion, 538 F.2d 308 (2d Cir.), cert. denied, 45 U.S.L.W. 3254 (1976), were there any countervailing policy reasons to exclude the impeaching evidence. The prosecution would have been given the opportunity to explain any of the omissions in the prior statements. Because the kneeling incident was one of the facts which the prosecution had to prove beyond a reasonable doubt in order to convict petitioner of felony murder, the jury, as the trier of the facts, should have been given the opportunity to hear all the evidence in order to pass upon the reliability of all of the witnesses', and particularly Garcia's, testimony regarding this critical fact.

In deciding whether this limitation of cross-examination was of constitutional magnitude, this Court is not required to find that had the inquiry been permitted the jury would have come to a different result. In Davis v. Alaska, supra at 317, the Supreme Court stated:

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they

could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act."
Douglas v. Alabama, 380 U.S. at 419.

Nonetheless, the Court is of the opinion that any error in this case either does not rise to a constitutional level, or else despite constitutional error it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); United States v. Duhart, 511 F.2d 7, 10 (6th Cir.), cert. denied, 421 U.S. 1006 (1975). This conclusion is based on the fact that even if the impeachment attempts had been successful, a number of factors tended to undercut the potential effect of such impeachment. First, the jurors would also have had before them Dannett's handwritten notes in which the kick was mentioned. Moreover, Garcia's wife also testified to the kneeling incident, and Theresa Gentry and Maureen LaGuardia testified that they saw the Patrolman crouching over. Lastly, the overall cross-examination was lengthy and did include readings from selected portions of the pre-trial statements regarding other matters.

With respect to the Byrne statements, had defense counsel juxtaposed a reading of the precise impeaching matter with the foundation he had laid it is reasonable to conclude that the judge would have allowed it. With respect to the Dannett transcript, it appears that the judge's ruling resulted in part from impatience with the lengthy and inartistic cross-examination, highlighted by defense counsel's

insinuation that Garcia never mentioned the kneeling incident prior to the Grand Jury.

In sum, the Court does not believe that the net effect of the evidentiary rulings was to deny Victory his right of confrontation.

II. Was Victory Denied Due Process by a
Failure to Instruct on the Meaning
of an Element of Felony Murder

In order for felony murder to have been predicated on the felony of second degree escape, the killing by Bornholdt had to have been in the course of or in furtherance of a common plan of escape by Victory and Bornholdt. Thus, the intent or attempt to escape would have had to have been formulated prior to or contemporaneous with the shooting; otherwise Victory would have been guilty of escape, but not felony murder. People v. Joyner, 26 N.Y.2d 106, 257 N.E.2d 26, 308 N.Y.S.2d 840 (1970). Clearly, then, the timing of the escape, or intent or attempt to escape, was critical.

To impart this distinction to the jury, defense counsel requested that the jury be charged:

In order for you to convict the accused, Albert Victory, of the crime of felony murder, you must find that the prosecution has proven beyond a reasonable doubt that prior to or contemporaneous with the killing, Victory formed an intent to escape from the custody of the Patrolman and attempted to so escape, and that the killing occurred in the course of and in furtherance of that attempted escape.

If the accused Albert Victory formed an intent to escape for the first time following the shooting and then fled from the scene of the shooting, he would not be guilty of felony murder and you must find him not guilty. If you have a reasonable doubt whether, prior to the shooting, Victory intended to escape from the custody of the Patrolman, you must acquit him of felony murder, the only crime charged in this indictment. (emphasis added) ³

The trial judge declined to give this instruction, charging instead the bare language of the statute, namely that the killing had to be "in the course of and in furtherance of" escape or attempted escape, or in "immediate flight therefrom." The "immediate flight therefrom" language logically could not have been applicable to the underlying felony of escape (how can one flee from an escape?), and may have confused the jury. ⁴ Aside from that, the main charge was minimally adequate insofar as it contained the statutory language encompassing the timing element, although the judge did decline to instruct the jury on the meaning of that language.

Subsequently, however, the jury three times sought further instruction on escape and asked to rehear testimony which appears relevant to that inquiry. Finally, at 9:56 P.M. on the second day of deliberations, and after all the previous instructions, the jury asked:

As a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?

The judge responded:

Now, ladies and gentlemen, that question does not in law permit of a categorical yes or no answer in the form in which it is posed to me. In the form in which this is phrased, I cannot give you a legal answer categorically yes or no, but I will try and make it all very clear to you and see whether or not this does not answer the question from a legal standpoint for you.

Now, first, I want to make it perfectly clear that in order that you find that the crime of escape in the second degree occurred, you must be convinced beyond a reasonable doubt that a defendant was arrested for a felony, as, for example, assault in the second degree; and that the defendant, such defendant, a defendant refused to submit to the authority of the arresting officer or challenged or resisted the arrest; and that a defendant escaped from custody.

You must find that, in order to find that the crime of escape in the second degree occurred, you must be convinced beyond a reasonable doubt that (1) a defendant was arrested for a felony, as, for example, assault in the second degree; (2) that a defendant refused to submit to the authority of the arresting officer or challenged or resisted the arrest; and (3) that a defendant escaped from custody.

Now, there is no doubt that -- I told you that -- the arresting officer here is a policeman, that is, a peace officer; he comes within that definition; and I told you what the law meant by "custody"; I explained that very clearly.

Now, flight after a shooting in and of itself does not necessarily constitute escape in the second degree. However, flight after a lawful arrest by a policeman for the felony of assault in the second degree does constitute the crime of escape in the second degree, whether that flight takes place before or after the shooting.

Is that clear?

Now, in other words, you have got to find things in this order: You must find them beyond a reasonable doubt. (1) That there was the felony of assault in the second degree; (2) that as a result of that assault in the second degree, there was a lawful arrest; and (3) that following that lawful arrest there was flight from the custody of that arrest.

Now, lastly, I am going to read once again subdivision 3 of section 125.25 of our Revised Penal Law, which says: "That a person is guilty of murder when, acting either alone or with one or more other persons, he commits or attempts to commit escape in the second degree and, in the course of and in furtherance of such crime, or of immediate flight therefrom, he or another participant, if there be any, causes the death of a person other than one of the participants." (Tr. 3176-78) (emphasis added)

Defense counsel objected to this supplementary instruction on the ground that it did not delineate the time element, and in fact misled the jury into thinking that escape after the shooting would be sufficient to convict on felony murder.⁵ About an hour later, at 11:42 P.M., the jury came back with convictions on felony murder.

Victory claims that the trial judge's repeated failure to delineate expressly the time element with respect to the predicate felony of second degree escape, compounded by the alleged confusion engendered by the supplementary instruction, denied him due process in that the failure to clearly charge an element led the jury to convict him erroneously of felony murder.

Before reaching the merits of this claim it is necessary to address the respondent's assertion that on this issue Victory did not raise a due process argument in the state courts and therefore he has failed to meet the exhaustion requirement of Picard v. Connor, 404 U.S. 270 (1971).⁶

EXHAUSTION

In Picard, the Supreme Court explained the policy underlying the exhaustion requirement:

The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, . . . reflects a policy of federal-state comity, . . . "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." . . . We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."

Id. at 275 (footnote and citations omitted).

In light of this policy the Court then went on to explain what a habeas corpus petitioner must do in order to fulfill the exhaustion requirement:

[T]he federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," . . . it is not sufficient merely that the federal habeas applicant has been through the state courts. The

rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. Id. at 275-76 (emphasis added, citation omitted).

"Fairly presented" means "whether, on the record and argument before it, the [state court] had a fair opportunity to consider the [asserted] claim and to correct that asserted constitutional defect." Id. at 276.

Thus, the question before this Court is whether "the substance of the constitutional claim has been presented to the state courts in a fashion which provides them a 'fair opportunity' to consider it," Anderson v. Casscles, 531 F.2d 682, 684 (2d Cir. 1976), or whether "[t]he most that can be said with respect to petitioners' contentions in the state courts . . . is that they urged [a violation of] their rights under state law." Cameron v. Fastoff, 543 F.2d 971, 977 (2d Cir. 1976) (emphasis in original). Accordingly, the Court will now examine the manner in which petitioner raised the jury instruction issue in the New York courts.

In the Appellate Division and New York Court of Appeals, Victory attacked the jury instruction in the following manner:

POINT I

Appellant Victory's conviction for felony murder was against the weight of evidence and unlawful because:

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(c) the evidence shows that Victory left the scene of the homicide after Bornholdt shot Varecha and thus the homicide did not occur during the course of a felony.

Albert Victory has been condemned to a term of life imprisonment for the felony murder of a police officer who was shot and killed by another person. His conviction raises the gravest constitutional doubts. Among those which loom largest in the wake of the judgment below, are:

.

(2) The undisputed evidence shows that Victory left the scene of the homicide sometime after Bornholdt shot Varecha and therefore Victory's alleged attempted escape did not occur during the course of the commission of any felony;

(emphasis added)

Victory went on to attack the trial judge's failure to explicitly instruct and reinstruct the jury on the timing of the escape.⁸ Thus, the same facts that Victory argues in this petition were argued in the New York courts.

The legal theory of Victory's argument to the New York courts was that he was convicted as a result of jury instructions that were erroneous in that they misstated the New York law on felony murder in failing to accurately delineate each of the elements. Victory did not cite or

discuss any federal cases nor did he make even a passing reference in the body of his argument to due process or unconstitutionality. In contrast, some of Victory's other arguments were explicitly grounded on constitutional claims.⁹ For these reasons, the Court attaches little weight to the broad prefatory statement in his New York briefs that "[h]is conviction raises the gravest constitutional doubts." Despite this catch-all phrase, the Court must conclude that Victory did not make an explicit constitutional argument in the New York courts. See, e.g., United States ex rel. Gibbs v. Zelker, 496 F.2d 991, 993-94 (2d Cir. 1974); Nelson v. Zelker, 465 F.2d 1121, 1124-25 (2d Cir.), cert. denied, 409 U.S. 1045 (1972); United States ex rel. Aloï v. Arnold, 413 F. Supp. 1384, 1387 (S.D.N.Y. 1976) (Weinfeld, J.).

However, this Court must not overlook that in Picard, supra, the Supreme Court also stated:

Obviously there are instances in which "the ultimate question for disposition," . . . will be the same despite variations in the legal theory or factual allegations urged in its support. . . . Hence, we do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. 404 U.S. at 277-78 (emphasis added, citations omitted).

Accord, United States ex rel. Gibbs v. Zelker, supra.

Thus, the question becomes whether Victory's due process claim, though not "denominated as such [was]

spelled out in substance" in his New York appeals. See United States ex rel. Gibbs v. Zelker, supra at 993; United States ex rel. Rosner v. Commissioner, New York State Dep't of Correction, 421 F. Supp. 781, 783 n.1 (S.D.N.Y. 1976); Chesney v. Robinson, 403 F. Supp. 306 (D. Conn. 1975), aff'd without opinion, 538 F.2d 308 (2d Cir.), cert. denied, 45 U.S.L.W. 3254 (1976).

In Picard, the petitioner had "challenged the validity of his indictment at every stage of the proceedings in the [state] courts." 404 U.S. at 276. However, the basis of his state court challenge was that he had been improperly indicted under state law. Id. at 277. The constitutional issue - denial of equal protection - was raised for the first time by the United States Court of Appeals reviewing the habeas corpus petition. Thus, the Supreme Court concluded:

To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts. The [state] Court dealt with the arguments respondent offered; we cannot fault that court for failing also to consider sua sponte whether the indictment procedure denied respondent equal protection of the laws.
Id.

The Court reached this conclusion because "[t]he claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination." Id. at 278.

That there is a difference in theory between challenging the validity of an indictment and asserting denial of equal protection is apparent. However, it is not so clear whether there is a difference in theory between asserting that a jury instruction is erroneous under state law for failing to accurately delineate each element of the crime, and asserting that the incomplete or misleading instruction denied petitioner due process by causing him to be convicted of an act which is not a crime by New York's definition.

It appears to the Court that this latter theory advanced by Victory in this petition is neither different nor identical to the theory advanced in the state courts. Rather, the two theories are interrelated as in United States ex rel. Gibbs v. Zelker, supra.

In Gibbs, the petitioner asserted in state court that his detention violated state law in that the confinement order was signed by an acting police justice. The Second Circuit stated:

we would hardly insist that the asserted inadequacy of the acting police justice's signature be raised in the state court in the specific garb of a federal constitutional question, so long as it had been adequately litigated there as a state question and the Fourth Amendment claim rested entirely on alleged violation of state procedural requirements. . . .
496 F.2d at 994.

Likewise, in the instant petition, the due process claim is dependent upon and is the logical extension of an assertion of reversible error in the failure to clearly charge each of the elements of the crime. Conversely, the state courts' rejection of Victory's claim that the charge was incomplete and misleading would necessarily have precluded the state courts from finding a violation of due process, had a due process claim been explicitly addressed to them. Thus it is reasonable to conclude that the state courts would not now find that an instruction they have already upheld violated due process.

Since "the state courts [have already had] an opportunity to set their own Constitutional houses in order," Fielding v. LeFevre, 548 F.2d 1102, 1106 (2d Cir. 1977), comity does not require this Court to refrain from ruling. Furthermore, because it would be futile for Victory to reassert essentially the same claim, though differently denominated, justice would not be served by giving the state courts another chance to scrutinize the same jury instructions while Victory continues to serve his twenty-¹⁰ five-years-to-life sentence. Accordingly, the Court holds that there has been exhaustion on the jury instruction¹¹ issue.

THE EFFECT OF THE INSTRUCTION

Turning to the merits, the starting point must be the oft-quoted language of Cupp v. Naughten, 414 U.S. 141, 146-47 (1973):

In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . [T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

However, the Supreme Court also stated that "this does not mean that an instruction by itself may never rise to the level of constitutional error." Id. at 147. This Court holds that in the peculiar circumstances of this case, it has risen to constitutional dimension.

If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt.

United States v. Clark, 475 F.2d 240 (2d Cir. 1973).

"Complex legalisms must be translated into simple prose that will be understandable by the average layman. . . . Terms of legal significance should be defined in a way that will be understood." Id. at 250. Although Clark

involved appellate review of a federal conviction, rather than habeas corpus review of a state conviction, its directive that jury instructions, including legal terms, must be understandable is relevant to a due process inquiry.

The Court must first inquire whether the jury understood that "in the course of and in furtherance of" escape ("or in immediate flight therefrom") meant that if Victory's intent to escape was not formulated until after the shooting they would have to acquit him of felony murder. Notwithstanding the number of times the judge instructed on the elements of escape and read the felony murder statute, the fact that the jury still had to ask whether "the fact of flight after the shooting itself establish[ed] escape." implies that they did not find an intent to escape prior to the shooting.

"In the course of and in furtherance of" is a legal term of art which may, and on the facts of this case did, require some explanation. For example, due to the absence of explanation of these terms, the jury may have erroneously thought that because the shooting enabled Victory to escape, i.e., because his escape in fact was furthered by the shooting, they could conclude that the shooting was "in furtherance" of the escape.

This case is stronger than, and therefore distinguishable from, Kibbe v. Henderson, 534 F.2d 493 (2d Cir. 1976), reversed, 45 U.S.L.W. 4457 (U.S. May 16, 1977). There

the United States Court of Appeals for the Second Circuit granted habeas corpus to a defendant who was convicted of second degree murder for reckless conduct which caused the victim's death. The petitioner and his co-defendant robbed the murder victim, who was blind drunk, removed his eyeglasses, pulled his pants down around his ankles and left him by the side of an unlighted rural road, in the freezing cold and blowing snow, and drove away. Subsequently, the victim made his way out into the road, where he was run over by a speeding truck which did not attempt to brake before impact. The Second Circuit granted the writ because the trial judge had not instructed the jury on causation. The Supreme Court reversed.

Unlike the instant petition, there may not have been actual jury confusion in Kibbe, perhaps because, as the Supreme Court held, the balance of the instructions fully explained the meaning of the causational element. In addition, common sense alone would suggest to a jury that for a defendant to be convicted of murder he must cause the death. Perhaps because causation was an obvious concept, defense counsel did not request an instruction on it, did not object to the lack of instruction, and did not raise the issue in the New York Appellate Division. The issue was raised in the New York Court of Appeals, after being raised for the first time by a dissenting judge in the Appellate Division.

In the instant case, however, it is clear from the jury's questions that there was actual confusion. Moreover, the confusion was on an issue where, as previously suggested, common sense could have led the jury to erroneously conclude that the killing was in furtherance of a subsequently formed intent to escape. Lastly, unlike in Kibbe, Victory's counsel repeatedly requested the judge to clarify the element of the time of the escape.

Therefore, the focus of the due process inquiry becomes whether the trial judge fulfilled his duty to clarify the evident confusion on a critical element, or whether he in fact compounded the confusion by the supplemental instruction he gave in response to the jury's inquiry.

The supplemental instruction in effect told the jury that they could find escape based on "flight after the shooting itself." However, the judge did not add that if this was the sole basis for their finding of escape, i.e., if they did not also find an intent to escape prior to or contemporaneous with the shooting, then they must acquit Victory. Rather, the judge merely tagged on a re-reading of the felony murder statute - the "in the course of and in furtherance of or in immediate flight therefrom" language with which he had already charged the jury and which had given rise to the jury's question.

United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975), a federal prosecution for felony murder, involved

this problem of the time of commission of the underlying felony. As in this case, the judge charged on the elements of felony murder essentially by reading the statute. The Court of Appeals stated that that would not have been error were it not for the fact that "the jury, itself, focused its attention on the timing problem, and indicated to the court that it was confused about exactly this issue." Id. at 1308 (footnote omitted). The Bolden jury focused on the timing problem by asking a question virtually identical to the question asked by the jury here.¹² The judge addressed the pointed question by re-reading the statute and standard instruction. The Court of Appeals reasoned that "[t]he standard instruction may be sufficient in the first instance on this issue . . . but the jury's request called for further explication of the law on this point." Id.

Bolden relied on the Supreme Court decision in Bollenbach v. United States, 326 U.S. 607 (1946), which also involved a federal prosecution in which the jury at the eleventh hour asked a question about the timing of the defendant's conduct. Justice Frankfurter stated:

[P]recisely because it was a "last minute instruction" the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were "hopelessly deadlocked" after they had been out seven hours . . . Particularly in a criminal trial, the judge's last word is

apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. The jury's questions . . . clearly indicated that the jurors were confused Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. . . . A conviction ought not to rest on an equivocal direction to the jury on a basic issue. Id. at 611-13.

Although this Court has drawn guidance from federal, non-constitutional cases, its conclusion is based on the constitutional standard set forth in Cupp v. Naughten, supra. Specifically, the question is whether the failure to adequately charge on the requisite timing of the escape, or otherwise explain the meaning of "in the course of and in furtherance of" ("or in immediate flight therefrom"), "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, supra at 147. This Court holds that it did, for "[i]n order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." In re Winship, 397 U.S. 358, 364 (1970). Here, however, the jury's questions, particularly its pointed question as to whether as a matter of law flight after the shooting in and of itself established escape, indicated confusion on the

timing of the escape for purposes of felony murder. Because the judge subsequently charged that they could find escape on the sole basis of "flight after the shooting," but did not clearly tell them that if they did so they must acquit Victory of felony murder, "the trial judge's instructions permitted the jury, in its fact-finding process to disregard [Victory's] colorable claim that [there was no preconceived plan of escape] and thus violated [Victory's] constitutional right to have every element of the crime with which he was charged proven beyond a reasonable doubt." Kibbe v. Henderson, supra, 534 F.2d at 494. Accordingly, the writ is granted on this claim.

III Whether Imposing on the Defendant
the Burden of Proof on the Affirmative
Defense to Felony Murder Denies Due
Process

This Court gave careful consideration to this weighty constitutional question while the matter was sub judice. However, because the writ has been granted on the jury instruction issue, the Court believes that it is compelled to exercise judicial restraint and not reach the serious question of the constitutionality of New York's requirement that a defendant prove by a preponderance of the evidence the affirmative defense to felony murder.

CONCLUSION

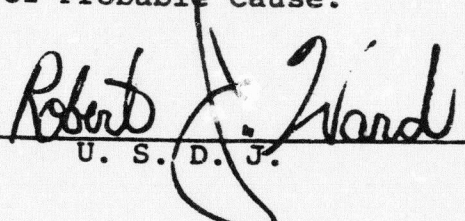
The People are directed to re-try the petitioner within ninety days of the final determination of this matter

or at the end of that period unconditionally release
petitioner from custody.

This petition poses significant questions of law
upon which the Court of Appeals should rule. Accordingly,
this Court will issue a Certificate of Probable Cause.

It is so ordered.

Dated: May 31, 1977



U. S. D. J.

NOTES

- 1 That section provides in part:

A person is guilty of murder when:

.

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants.

- 2 Even if this interpretation is correct, it does not support the prosecution theory which is that Victory kneed the officer.
- 3 On numerous occasions throughout the jury deliberations defense counsel urged the court to make this distinction for the jury.
- 4 The inclusion of "or in immediate flight therefrom" may have confused the jury in that it may have suggested that immediate flight from the murder, as opposed to the underlying felony, would have been sufficient for felony murder purposes. That this may have been the jury's understanding is bolstered by their question, see infra, concerning the legal significance of "flight after the shooting."

- 5 MR. POLLINA: Your Honor, may I respectfully take exception to the instructions given to the jury with regard to what the law is. Your Honor did not tell that jury that, in determining whether or not there is a felony murder, they must consider whether or not the escape took place at the same time that the homicidal act took place; and Your Honor has definitely left an impression with that jury that the flight after the homicidal act would be sufficient for purposes of making out a felony murder. That is not the law, and I would take an exception to

the instructions given by the Court to
the jury.
(emphasis added)

- 6 It is undisputed that there has been exhaustion on the other two issues.
- 7 Brief for Appellant Victory at 11, People v. Victory, 38 A.D.2d 689, 327 N.Y.S.2d 544 (1st Dep't 1971); Brief for Appellant Victory at 10-11, People v. Bornholdt, 33 N.Y.2d 75, 305 N.E.2d 461, 350 N.Y.S.2d 369 (1974).
- 8 See Brief for Appellant Victory at 21-26, People v. Victory, supra; Brief for Appellant Victory at 21-25, People v. Bornholdt, supra.
- 9 E.g., Brief for Appellant Victory, People v. Victory, supra: Point I(b) (privilege against self-incrimination); Point II (denied due process by joint trial); Point III (right of confrontation under sixth amendment to the United States Constitution).
10. See Hallowell v. Keve, 412 F. Supp. 681, 685 (D. Del. 1976):

The exhaustion doctrine . . . precludes federal review only when a petitioner's state remedy is both "adequate and available". . . . Accordingly, where it is clear from existing decisions of a State Supreme Court that pursuit of a state remedy would be futile, exhaustion is not required.
(citations omitted)

- 11 "In any event, the exhaustion requirement . . . is not jurisdictional and courts may deviate from it in those rare instances where justice so requires." United States ex rel. Graham v. Mancusi, 457 F.2d 463, 468 (2d Cir. 1972) (Friendly, J.). In view of the unusual facts of this case, the serious consequences for Victory, and the foregoing exhaustion analysis, the Court alternatively concludes that if there has not been exhaustion, justice requires deviation from that stricture in this case.

- 12 "'If it is determined that robbery was in fact committed, does this necessarily imply previous intent to commit a robbery? . . ."
514 F.2d at 1308 (emphasis in original).

[DECISION OF THE DISTRICT COURT (WARD, J.), DATED JULY 25, 1977
ORDERING PETITIONER'S RELEASE ON BAIL PENDING APPEAL]

94 a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ALBERT VICTORY,

Petitioner,

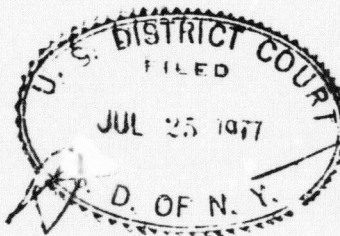
76 Civ. 3493

R.J.W.

-against-

ROY BOMBARD, as Superintendent
of Greenhaven Correctional
Facility,

Respondent.
-----x



Petitioner applies pursuant to Rule 23(c),
Fed. R. App. P., for enlargement pending respondent's
appeal from this Court's decision of May 31, 1977 granting
petitioner the writ of habeas corpus. For the reasons
hereinafter stated, the application for enlargement is
granted.

Rule 23(c) provides that enlargement pending
appeal of a decision granting the writ shall be ordered
unless the Court otherwise directs. Based on this language
and on the case of United States ex rel. Thomas v. New
Jersey, 472 F.2d 735, 742-43 (3d Cir.), cert. denied, 414
U.S. 878 (1973), petitioner argues that there is a pre-
sumption in favor of enlargement when the writ has been
granted.

JUL 25 1977

79 20

It is unnecessary for this Court to decide whether there is a presumption either in favor of enlargement as petitioner argues or against enlargement as respondent in effect urges. Rather, for practical purposes, the Court approaches the issue as it would any matter relegated to its discretion.

Respondent urges that there is such a substantial risk of flight and that petitioner's release would pose such a danger to the community that the Court should refuse to grant bail. The Court finds the factual support for respondent's arguments unpersuasive. The facts presented for the most part pre-date petitioner's incarceration over eight years ago, some going back twenty years. Respondent's affidavits cite petitioner's arrest record, including criminal conduct of which petitioner was acquitted or was never charged, and his assaultive behavior prior to his incarceration in 1968.

On the other hand, petitioner presented affidavits and letters attesting to his being a good bail risk. Beyond these affidavits, the Court observed petitioner in his appearances before the Court and noted the presence in Court of numerous members of his family and friends. On the basis of all these factors, the Court has concluded that the risk of flight is minimal.

Less certain is whether petitioner would present a danger to the community. The Court was impressed with what it believes to be petitioner's sincere desire to avoid the confrontations which led to most of his past difficulties. In addition, the Court believes that petitioner is now older and, hopefully, wiser than he was before his present incarceration and for all these reasons has concluded that he does not present a danger to the community.

Accordingly, the application for enlargement pending appeal is disposed of as follows:

1. The Court grants enlargement on bail which is fixed in the amount of \$10,000 cash or surety;

2. The petitioner's bail limits shall be the Southern and Eastern Districts of New York;

3. It is a condition of petitioner's release that he report for work to Daniel L. Myers, Esq. and Elizabeth Fink, Esq., 250 Broadway, New York, New York, on a regular basis, at least three times a week;

4. The petitioner's release on bail is stayed until July 28, 1977 at 10:00 A.M. to enable respondent to apply to the United States Court of Appeals for the Second Circuit for whatever relief he deems appropriate.

It is so ordered.

Dated: July 25, 1977



U. S. D. J.

77-2075

97 a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Albert Victory,
Petitioner-Appellee,

v.

Roy Bombard as Superintendent of
Green Haven Correctional Facility,
Respondent-Appellant.

The District Attorney for New York County on behalf of respondent has moved for a stay of an order entered on July 20, 1977, in the Southern District of New York, Robert J. Ward, Judge, releasing relator/appellee, a state prisoner, on \$10,000 bail pending respondent's appeal to the Court of Appeals from an order issued by Judge Ward on May 31, 1977, granting relator's petition for a writ of habeas corpus unless he is retried by the State of New York within 90 days. The motion for a stay was referred by the panel sitting during the week of July 18 to the undersigned sitting as a single application judge this week. Under scheduling order dated July 11, 1977, respondent-appellant's brief is due on August 15, 1977, petitioner-appellee's brief is due on September 15, 1977, and the appeal is scheduled to be heard during the week of October 3, 1977, less than ten weeks away.

Appellee was convicted on May 26, 1970, in New York State Supreme Court, after trial by jury, of felony murder of a New York City police officer and was sentenced to 25 years' to life imprisonment. The conviction was unanimously affirmed by the Appellate Division, First Department, 38 App. Div. 2d

689 (1971), and by the New York Court of Appeals, 33 N.Y.2d 75 (1973), and certiorari was denied by the United States Supreme Court, 416 U.S. 905 (1974).

The district court in granting appellee's application for enlargement did so under Fed. R. App. P. 23(c). Holding that it was unnecessary to decide whether there was a presumption favoring or disfavoring enlargement, see United States ex rel. Thomas v. State of New Jersey, 472 F.2d 735, 742-43 (3d Cir. 1973), Judge Ward held that as a matter of discretion he would grant the application on the following bases: "the risk of flight is minimal" on the basis of affidavits submitted, his appearance before the court and the presence in court of members of his family and friends; while "[l]ess certain is whether petitioner would present a danger to the community," Judge Ward was impressed with his "sincere desire to avoid the confrontations which led to most of his past difficulties" and "believes that petitioner is now older and hopefully wiser" so that "he does not present a danger to the community."

While I give all due weight to the district court's exercise of discretion, I take it that by virtue of the wording of Rule 23(c) the court of appeals or a judge thereof must examine the question de novo; rather than conform to the language of Fed. R. App. P. 9, dealing with bail on appeal from judgments of conviction in the federal courts, where the role of the court of appeals is one of review only, Rule 23(c)

appears to make denial of enlargement a matter alternatively for the district court or the court of appeals as the case might be. In making this determination de novo, however, I give full weight to the district court's observations of appellee in court.

Danger to the community and likelihood of flight are, of course, relevant under Rule 23(c). Prior to the conviction for which appellee is presently incarcerated, he was given a maximum sentence for robbery in the first degree, was charged with rape although the charges were dropped for lack of corroboration, and had several assorted other charges of crimes of violence including one resulting in conviction in 1969 of assault in the third degree and another in conviction of "attempted possession of a weapon." As recently as 1976, appellee was tried in United States v. DeSavario, 875 Civ. 195, in the Southern District of New York before Judge Frankel in connection with receipt of narcotics in his prison cell, resulting in a hung jury but acquittal by Judge Frankel. In the same trial the very person with whom it appears appellee proposes to live if released on bail was also tried but acquitted by the jury without, however, having evidence before it of another heroin transaction engaged in by the individual. In acquitting appellee of the charges made against him Judge Frankel expressly did not "reject the thought" that "he may have received some narcotics at some point while he was in prison." Moreover, it appears from a letter dated July 19,

1977, of the warden of the Metropolitan Corrections Center to Judge Ward that since appellee's original commitment to the Center on November 28, 1975, he was the subject of three misconduct reports though on another occasion he helped to save the life of another inmate who attempted to commit suicide and also assisted the unit officer during the recent blackout.

On the strength of all the foregoing, together with materials submitted and examined in camera, the undersigned can conclude neither that the risk of flight is minimal, as found by Judge Ward, nor that appellee would not, if released, present a danger to the community.

In addition to the foregoing and, even treating the matter as if this judge's power were limitedly solely to review of an exercise of discretion under Rule 23(c) and not an examination de novo of the facts, the decision of the district court has not given sufficient weight to our own decision in United States ex rel. Rice v. Vincent, 486 F.2d 215 (2d Cir. 1973). There we pointed out that in cases pursuant to 28 U.S.C. § 2254 where the district court has granted the writ, this court has "carefully refrained from granting bail" and we reversed the district court's grant of enlargement there even while expediting the appeal. That decision gave weight to the interests of comity that are here involved. While to be sure it is up to the federal court to grant or deny enlargement on bail pending federal habeas corpus

and as held in Thomas, supra, by the Third Circuit it cannot direct the state court in this regard, the fact is that we are dealing with a writ of habeas corpus directed to state court proceedings where elements of comity are relevant, see Stone v. Powell, 428 U.S. 465 (1976), and Wainwright v. Sykes, 45 U.S.L.W. 4807 (U.S. June 23, 1977). Appellee has been able to refer to no case in which this court has upheld an enlargement in a § 2254 proceeding. While I have no doubt but that a proper case could be presented in which enlargement would be upheld despite considerations of comity, this case is not it.

Accordingly, on each of the foregoing bases, the District Attorney's motion for a stay is granted. Since the appeal has already been expedited and an expedited scheduling order has been filed, there is no necessity to deal with that aspect of the matter in conjunction with this application.

JAMES L. OAKES
U. S. Circuit Judge

July 27, 1977

Service of 1 copy copies of the
within APPENDIX is hereby
admitted this 31st day of
AUGUST 1977

Signed William Hellerstein, Esq., The Legal Aid Society

Attorney for PETITIONER-APPELLEE

by H. J. Skinglass, ADA,
as authorized by
A. Fine, Esq. of the
Legal Aid Society.